



STATE BOARD OF EQUALIZATION STAFF LEGISLATIVE BILL ANALYSIS

DRAFT

Date Amended:	05/04/11	Bill No:	Senate Bill 342
Tax Program:	All Taxes and Fees	Author:	Wolk
Sponsor:	Author	Code Sections:	RTC 41
Related Bills:		Effective Date:	01/01/12

BILL SUMMARY

This bill would, in part, prohibit any person from charging a contingent fee for services rendered in connection with any matter before the Board of Equalization, the Franchise Tax Board or assessment appeals boards or for any other matter involving a tax imposed under the Revenue and Taxation Code.

ANALYSIS

CURRENT LAW

California state law is generally silent with respect to contingency fees.

Under Business and Professions Code Section 5061, certified public accountants (CPAs) are not allowed to accept *commissions* as compensation for services in certain circumstances.

[IRS Circular 230](#), Section 10.27(b) prohibits individuals practicing before the IRS (attorneys, CPAs, enrolled agents, etc.) from charging clients contingency fees except under well defined circumstances.

The American Institute of Certified Public Accountants Code of Professional Conduct, [Rule 302](#) precludes CPAs from charging contingency fees in specified instances.

PROPOSED LAW

Prohibition. This bill would add Section 41 to the Revenue and Taxation Code to prohibit any person from charging a contingent fee for services rendered in connection with any matter before the State Board of Equalization (BOE), Franchise Tax Board (FTB), or any assessment appeals board. It would also prohibit any person from charging a contingent fee for services rendered in connection with any other matter involving a tax imposed under the Revenue and Taxation Code. It provides that contingent fees for services are against public policy and any contract or arrangement that provides for a contingent fee would be void and unenforceable.

Contingent Fees. “Contingent fee” is defined as any fee that is based, in whole or in part, on whether or not a position taken on a tax return or other filing avoids challenge or is sustained either by the BOE, FTB, an assessment appeals board, or in litigation.

A contingent fee includes, but is not limited to, a fee:

- based on a percentage of the refund reported on a return,
- based on a percentage of the taxes saved,
- that depends on the specific tax result attained, or
- that is paid or agreed to be paid, but then reimbursed or credited

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Penalty. The penalty for each violation of the prohibition is the greater of \$5,000 or 100 percent of the contingent fee charged. The penalty applies whether or not any contingent fee was actually paid or otherwise received, directly or indirectly, by the service provider. It is due and payable upon notice and demand from the BOE for contingent fees relating to tax and fee programs administered by that agency, including property tax assessments, or the FTB for contingent fees relating to taxes administered by the FTB.

Administration. To prevent the use of contingent fee arrangements, the BOE and FTB are expressly authorized to use a variety of administrative methods including adopting regulations. Additionally, a person rendering services may be required to provide upon request, written certification, under penalty of perjury, that the fee for those services does not include, in whole or in part, a contingent fee.

Effective Date. The prohibition applies to fee arrangements entered into on or after the date the bill becomes effective.

COMMENTS

1. **Sponsor and Purpose.** The author is sponsoring this bill to provide “a way to make the tax system more honest by taking away the incentive for unregulated consultants to seek aggressive tax returns on a contingency fee basis. Contingency fees tie a consultant's compensation to the amount of a taxpayer's tax refund, providing a strong incentive to play fast and loose with rules, requiring pay outs of big tax refunds from taxes previously collected and spent, and often leading unsophisticated firms into audits. This bill doesn't affect a taxpayer's right to file a claim for refund for any tax, only regulates the way they pay unrelated third parties seeking refunds on their behalf.”
2. **Applies to all persons.** While the author's statement indicates that this bill is intended to target “unregulated consultants” who are not otherwise subject to state law or a code of ethics like CPAs and attorneys, it would not be limited in application to unregulated consultants. As drafted, this prohibition would apply to consultants, lobbyists, agents, and representatives, in addition to attorneys and CPAs.
3. **Applies to all matters.** This bill would ban contingent fees in practically all work associated with any tax imposed in California under the Revenue and Taxation Code.
4. **Banning a particular method of compensation.** Proponents of a contingency fee ban claim that it is needed to counter a sophisticated cottage industry of non-accountant tax consultants that file aggressive claims, including abusive tax shelters, or appeals with questionable justification. For example, in the case of income tax returns, it is stated that consultants offer to amend a taxpayer's previous state income tax returns seeking refunds of previous taxes paid by claiming tax credits not included on the taxpayer's original return. In the case of property tax appeals, consultants on a contingency fee basis might be motivated to request values with questionable justification, if compensation is tied to a percentage of tax savings.
5. **Impact on tax administration.** Proponents of banning contingency fee arrangements hold that such arrangements have encouraged excessive, speculative, and frivolous disputes and litigation. While taxing officials and taxpayers are naturally at odds on occasion, proponents state that the cottage industry of tax consultants that develops around each tax amplifies, and in some

cases manufactures, those disputes. The resulting impact in workload to resolve those greater number of disputes and challenges increases the cost to administer each tax and diverts and delays attention from those taxpayers with justifiable concerns.

6. **Contingency fee arrangements may be used by taxpayers with limited financial means to obtain legal or professional services that they could not otherwise afford.** Opponents claim that this bill would harm taxpayers and small business owners who otherwise would be unable to afford to hire a tax professional or are unable to take time and attention away from their core business to work on a tax issue themselves. Opponents note that contingency fee arrangements provide access to the courts for those who cannot afford to pay the attorneys fees and costs of civil litigation and would otherwise not have any effective means of contesting a tax liability.
7. **The complexity of taxes.** Opponents note that the various tax laws can be confusing to taxpayers. As such, a taxpayer may be unaware of all the tax benefits to which they are legally entitled. The work performed by tax consultants serves to this group of taxpayers and business owners. For instance, taxpayers that prepare their own tax returns may be unaware of various tax credits available. Additionally, the documentation needed to verify eligibility for a credit, and file an amended return could be too costly, time consuming, or complicated for the taxpayer to attempt.
8. **Matters before the Board of Equalization.** There are a variety of matters before the BOE; some involving contingency fee arrangements. For example, the Board considers appeals from taxpayers regarding income taxes, sales and use taxes, excise taxes, fuel taxes, insurance tax and state-assessed property values. Of these, BOE staff is aware that state assessee property tax appeals, R&D income tax credit appeals and enterprise zone income tax credit appeals may involve contingency fee arrangements. However, with the exception of the comment below, staff is unaware of how common this arrangement is, what the percentage or standard is, or whether contingency fees are common in other areas, as staff is not privy to the payment arrangements between taxpayers and their representatives.
9. **Local governments also use contingent fee based services.** While this bill appears directed at fee arrangements between taxpayers and tax consultants, some local governments also have performance based contracts with tax consultants. For instance, with respect to allocation of sales and use tax revenues, some cities contract with consultants on a contingency fee basis to audit the allocation of revenues in search of misallocation of revenues between jurisdictions. While allocation of tax revenues is a zero sum game, one local government loses 100% of the misallocated revenue, while the other local government gains 75% of the misallocated revenue and the consultant's fee of the found revenue is 25%.
10. **This bill would apply to matters broader than the adjudication of tax appeals.** This bill does not appear to be limited to matters directly before the BOE and FTB members. As written, the phrase "*any other matter* involving a tax imposed under this code" would appear to ban contingency fees when a tax representative works with the staff of the BOE and FTB, as well, and thus would apply to interactions at the staff level of the agencies. For instance disputing an audit, or disputing a cigarette and tobacco tax license suspension, etc.
11. **Would the ban apply to a fee or an assessment levied under other bodies of law?** As written, this bill applies to all *taxes* in the *Revenue and Taxation Code*. It

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would not appear to apply to a fee or assessment levied pursuant to another body of law that was under the purview of a local governmental agency, unless that local agency was the assessment appeals board. For example, a landscaping or lighting special assessment imposed under the Government Code.

- 12. Is this ban intended to apply to property tax appeals before the assessment appeals board, but not those before the Board of Supervisors sitting as the local board of equalization?** In all counties in California, either one or more assessment appeals boards or a county board of supervisors perform the duties of a local board of equalization. In 19 counties, the board of supervisors also serve as the county board of equalization. If the ban is intended to apply to all property tax appeals at the local level, the phrase “county board of equalization or the assessment appeals board” should be substituted for “assessment appeals board.”
- 13. Penalty imposition and collection in the case of an assessment appeal involving property tax assessments.** At line 13, page 3, the duty to collect the penalty appears to be placed upon the BOE. This raises the question of how this would work in application. How would the BOE become aware of the penalty imposition by an assessment appeals board? This information would be needed from the counties. Also, the bill does not specify that the BOE is to transmit the penalty to the assessment appeals board, which raises the question of what entity is to receive the penalty monies.
- 14. Prospective Application.** This bill provides that the prohibition applies to fee arrangements entered into on or after the effective date of the bill. It appears **that** an open ended contract as to representation could continue indefinitely. If a contract was entered into two years ago and continues on, then would contingency fees be permissible?

COST ESTIMATE

Enactment of this bill would not materially affect the BOE’s administrative costs.

REVENUE ESTIMATE

This bill has no direct revenue impact.

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